

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA

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REGULAR CALENDAR
STAFF REPORT AND PRELIMINARY RECOMMENDATION

Application No.: 6-00-126

Applicant: City of San Diego, Park and
Recreation Department

Agent: Robin Stribley

Description: Establishment of the "Seal Rock Marine Mammal Reserve" on a permanent basis over 1.35 acres of open coastal waters, prohibiting human access within reserve boundaries except for permitted commercial fishing, emergency access and fishing consistent with the Federal Marine Mammal Protection Act; and, installation of signage for identification purposes and for public education and information.

Site: West of Coast Boulevard, between Children's Pool to the south and Shell Beach to the north and northwest, La Jolla, San Diego, San Diego County.

STAFF NOTES:

Summary of Staff's Preliminary Recommendation:

Staff is recommending approval of the proposed marine mammal reserve with a number of special conditions. The proposed project raises the issue of conflicts between public access to the ocean and protection of the harbor seals that use the area as a haul-out location. As proposed, establishment of Seal Rock as a permanent marine mammal reserve will prohibit public access (swimming, scuba diving, tidepooling, etc.) in the water for a large area surrounding the rock and it has not been documented that establishing the area around the rock as a reserve will afford any more protection to the seals than signage and a good docent program. In addition, establishing Seal Rock as a permanent marine mammal reserve would be inconsistent with the state tidelands grant (Chapter 688) which specifically calls for the absolute right of access to the water. Thus, the Commission cannot approve this area as a permanent marine mammal reserve. According to State Lands Commission staff, it is not possible to make this area a permanent reserve without first amending the tidelands grants.

However, if the proposal is modified as recommended by staff, it can be found consistent with both Coastal Act policies and the existing tidelands grant. Special Condition #1 limits the duration of the proposed marine mammal reserve to a period not to exceed five years. During this time, the City may study the area and use by the seals to determine if there is a basis to pursue an amendment to the tidelands grant for making this a permanent reserve. Special Condition #2 requires submittal of sign plans for installation of proposed signage identifying the boundaries of the reserve and for public information/education about the seals. Special Condition #3 requires submittal of final plans which require a reduction in the size of the proposed marine mammal reserve to extend no further than 100 ft. south and east of Seal Rock, thus reducing the potential for disturbance of seals by people in this area. With these conditions, some protection will be afforded to the seals in this area, while minimizing impacts on public access.

Substantive File Documents: City of San Diego Manager's Report dated 7/26/99; City of San Diego Ordinance #18733 dated 12/7/99 for establishment of Seal Rock Marine Mammal Reserve; Behavioral Ecology and Demography of Seals and Sea Lions at the Seal Rock Marine Mammal Reserve by Hubbs-Sea World Research Institute – 1/2/98; CCC CDP's #6-93-26, 6-98-22

I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission approve Coastal Development Permit No. 6-00-126 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE THE PERMIT:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there

are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. Standard Conditions.

See attached page.

III. Special Conditions.

The permit is subject to the following conditions:

1. Permit Limitations. The permitted marine mammal reserve shall expire five years from the date of Commission action. Any future proposal to continue the area as a reserve shall require another coastal development permit.

2. Interpretive/Identification Signage. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director final plans for the proposed identification, information and education signage related to the proposed marine mammal reserve. The proposed signage shall consist monument signs or wall signs, not to exceed eight signs total. No freestanding signs shall be placed on sandy beach at Children's Pool Beach. No tall, free-standing pole or roof signs shall be allowed. Said plans shall be subject to the review and written approval of the Executive Director.

The permittee shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

3. Revised Boundaries for Marine Mammal Reserve. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit a revised site plan which includes revisions to the boundaries of the proposed reserve such that the reserve shall extend 100 feet to the east and south of Seal Rock, as identified in Exhibit No. 2 (Site Plan/Revised Boundaries of Seal Rock Marine Mammal Reserve Pursuant to Special Condition No. 3).

The permittee shall undertake the development in accordance with the approved site plan. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the site plan shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

IV. Findings and Declarations.

The Commission finds and declares as follows:

1. Detailed Project Description/History. Proposed is the establishment of a permanent marine mammal reserve called “Seal Rock Marine Mammal Reserve” in the area that was a temporary reserve between 1994 and 1999. The City proposes to re-establish the reserve on a permanent basis which would prohibit human access within the reserve boundaries except for permitted commercial fishing, emergency access and fishing consistent with the federal Marine Mammal Protection Act. Also proposed is the installation of signage to identify the area as a reserve and for public education and information purposes. Project proponents believe that making the area into a reserve will make people more aware of the laws protecting the seals, namely, the Marine Mammal Protection Act, and will afford the seals greater protection than currently exists. The City has indicated they plan to re-evaluate the effectiveness of the reserve in five years.

The project site is located north of Children's Pool and southwest of Shell Beach in the La Jolla community of the City of San Diego. Children's Pool Beach is a sandy pocket beach protected and sheltered by an existing breakwater that was constructed in the 1920's. The top of the breakwater is about four feet wide and consists of a public walkway bordered by handrails on both sides. It is a popular place for the public to walk and view the ocean and the seals. Next to Children's Pool Beach is a lifeguard tower and public restrooms. To the south of the lifeguard station, a walkway slopes down to provide access to the breakwater. There is also a gated, unimproved emergency vehicle ramp that provides pedestrian access down to Children's Pool. To the north of the lifeguard station there is another set of stairs which lead down to Children's Pool Beach. Seal Rock is located approximately 400 feet north of Children's Pool and consists of a large rock which is surrounded by other smaller rock formations which are submerged at moderate to high tides and exposed at low tides (ref. Exhibit No. 1). At low tides, tidepools are exposed in the area immediately east of Seal Rock that extend to the toe of the steep coastal bluffs. Above these bluffs is a public walkway and Coast Boulevard, the first public roadway. East and northeast of Seal Rock is Shell Beach, a small sandy pocket beach. A set of stairs leads down to this beach from the public sidewalk at the top of the coastal bluffs.

Seal Rock is located about 120-135 feet west of the toe of the coastal bluff in this area. The proposed boundary for the reserve is roughly a square-shaped area that encompasses Seal Rock and adjacent rock formations to the south. Commencing at the toe of the bluffs which is the northeast corner of the proposed reserve, the proposed boundary would extend approx. 210 feet due west, then 262 feet south, then 235 feet east back to the toe of the bluffs. The eastern boundary then follows the toe of the bluffs approx. 200+ feet north to the point of beginning. In relationship to Seal Rock itself, the western boundary of the proposed reserve is 20 feet to the west; the southern boundary is 180 feet to the south; and the northern boundary is 30 feet north of Seal Rock (ref. Exhibit No. 2).

As noted above, the proposed reserve is the site of a former temporary reserve approved by the Coastal Commission pursuant to CDP #6-93-26 on 11/18/93. In this action, the Commission authorized the establishment of a temporary 1.35. acre marine mammal reserve consisting of open

coastal waters (and Seal Rock) extending easterly to the toe of the coastal bluffs including installation of buoys, and signage to prohibit public entrance into the reserve area. Special conditions of the permit required the applicant to submit annual monitoring reports regarding education and/or research activities related to the proposed marine mammal reserve. In addition, a final report at the end of the five year period was required to summarize the findings of the research and present any conclusions regarding harbor seal usage of Seal Rock. Although signage was installed in the area, the buoys were never placed in the water.

In September of 1999 the term of the coastal development permit ended and the reserve status lapsed, returning the surrounding waters around the Seal Rock to unrestricted use by the public for swimming, diving, tidepooling, etc. Since that time, the City considered alternatives to making Seal Rock a reserve. Two months after the reserve lapsed the City Council directed the City staff to pursue making the reserve permanent. However, the City staff first consulted with other resource agencies. This process took longer than expected. In the meantime, the existing signage identifying the reserve remained in place in the vicinity of the reserve. The City has indicated it wanted to await the result of their request before the Coastal Commission for a permanent reserve before removing the signage. Even though the signs are still there identifying the area as a reserve, the lifeguards are not enforcing the reserve boundaries. The City Council subsequently recommended that the area that was the former temporary marine mammal reserve be made into a permanent reserve, without any changes to its boundaries.

The subject site is located in an area of original jurisdiction, where the Commission retains permanent permit authority. As such, the standard of review is the Chapter 3 policies of the Coastal Act.

2. Public Access/Marine Resources. The following sections of the Coastal Act are applicable to the subject project.

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30220

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.

Section 30230

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30240 (b)

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

The seals use Seal Rock as a haul-out (resting area) location. Seal Rock and vicinity (i.e., Children's Pool Beach) is the only known regularly used haul-out site on the mainland south of Point Magu in Santa Barbara along California's coast. Seals must get out of the water or "haul-out" for a certain period of time every day. They must haul-out for longer periods of time during the "pupping" (birth of young) and "molting" (shedding of skin and hair) seasons. The pupping season is typically during the months of February through July.

It has also been reported in the past that seals have used a reef located approximately 50 feet directly west of the breakwater at Children's Pool, as a haul-out also, but to a much lesser degree than Seal Rock itself. The reef is not within the area of the proposed reserve. In 1993 when the Commission was reviewing the original request to make Seal Rock into a reserve, there were also reports then that seals had hauled-out at Children's Pool the summer of 1993 which at that time was noted as being unusual. At that time, portions of Children's Pool were roped off to keep people from getting too close to the seals.

A local citizen group originally initiated the idea to make the area into a reserve in 1993. The main purpose was to prevent the disturbance by humans. At low tide conditions, there are tidepool areas and low submerged rocks that become exposed. The public has used this area in the past for tidepooling and sometimes they disturb the seals by approaching too closely.

When the Commission approved the former temporary reserve for a period of five years, the purpose of the reserve was to prohibit public use of the area to avoid disturbance of

the seals by human presence in the area. During this time, studies were to be conducted to determine 1) whether or not the site was a rookery and 2) whether or not the presence of people in the area had adversely affected the breeding habits or overall behavior of the seals. At that time, the City had indicated that if the site was determined to be a rookery, it would support the permanent delineation of the area as a marine mammal reserve to create a safe habitat area for the harbor seals to breed and pup. If it was determined that it was not a rookery, the City would consider whether or not the presence of people in the area was significantly altering the behavior of the seals or otherwise disturbing them to such a degree that would warrant the area being made into a permanent marine mammal reserve.

A) Results of Two-Year Study/City Review. Hubbs-Sea World Research Institute conducted a two-year study of the Seal Rock Marine Mammal Reserve at the request of the City of San Diego from October, 1995 to September, 1997 (ref. Exhibit No. 3). The study did not reach any conclusions but instead included: characterization of pinniped use of Seal Rock Marine Mammal Reserve (SRMMR) (e.g., haul-out vs. rookery); demography of pinnipeds at SRMMR (e.g., site fidelity, seasonal abundance); diurnal and seasonal variation in haul-out patterns of pinnipeds at SRMMR; and impact of human activities on pinnipeds at SRMMR (e.g., effectiveness of docents). The last category studied is most relevant. The report indicated that humans and birds were the primary source of disturbance to pinnipeds at SRMMR. Other minor sources of disturbances included loud noises. It is further stated in the report:

“Our subjective evaluation is that seals were disturbed less often and approached less closely by humans when docents were present. The docent program did not last long enough to allow us to quantitatively compare disturbances before and after its implementation. Signs installed by the City, rope barriers placed by lifeguards across Children’s Pool Beach, and presence of lifeguards and researchers were also effective deterrents to disturbance at SRMMR and other haul-outs in the vicinity.”

It was also stated in the study that the rocks within the boundaries of the reserve were used as a regular haul-out and molting site. However, it was not determined that pups were being born within the reserve and thus, Seal Rock was not proven to be a rookery.

Based on the Hubbs report, the City of San Diego Manager’s Report, dated 7/26/99 (ref. Exhibit No. 4), recommended that the City allow the reserve to lapse and instead implement measures which have been effective in reducing instances of people disturbing seals. In making this recommendation, the Manager’s Report concluded that:

There is no evidence that the Reserve designation at Seal Rock has achieved its objective of reducing instances of humans disturbing seals. The three actions which appear to have reduced seal disturbances are: educational signs, a docent program, and barricades on the beach at Children’s Pool. Therefore, the Seal Rock Marine Mammal Reserve should be allowed to sunset on September 16, 1999, and the City should continue to: 1) provide educational signs about seals, the Federal Marine Mammal Protection Act, and warning that seals bite; 2) endorse a privately funded

and managed harbor seal document program in the area; and 3) keep people away from the seals hauled out on the beach at Children's Pool.

B. Relationship of Seal Rock Marine Mammal Reserve to Occurrences at Children's Pool. Children's Pool is not part of the proposed marine mammal reserve. However, as noted previously, seals are now using Children's Pool as a haul-out area in addition to Seal Rock. Also, other significant changes to seal behavior and access to the water at Children's Pool have recently occurred which are relevant to the proposed project. They are described in detail in the subsequent findings:

a) Children's Pool Posted by County Health Department. Approximately one-and-a-half years ago, Commission staff received reports that a barricade had been installed at Children's Pool Beach to the south of Seal Rock. At the time Commission staff discussed the matter with City staff, the City stated that the barrier had been installed to keep people out of the water at Children's Pool because the water had become contaminated as a result of seal feces. The County Health Department had posted Children's Pool as unsafe for humans. Section 409.5 of the City's Penal Code allows the City to take such measures in the interest of public safety. At the time, it was explained that the County would continue to test the water quality on a regular basis with the idea that once the water was safe again for humans, the barricade would be removed. However, the barricade has remained in place since that time and access to the water closed to the public due to contamination.

The City has indicated that the County Health Department informed the City that even though water samples and testing may at times indicate that the water is safe for human contact, as long as the source of the contamination was still in the area (namely, the seals), the site would remain posted indefinitely because it poses a continuing public health threat which requires avoidance of the water by humans. County Health Services also informed the City that potentially harmful bacteria and viruses coming from the seal feces are always present in the water to some degree and that humans coming in contact with those bacteria and viruses could become sick. Commission staff contacted the County Health Department to find out if there had been any change to the direction previously given to the City. County Health confirmed that as long as seals continue to use the area, Children's Pool will remain closed to human contact. This is because even if weekly water quality samples indicated that water quality had returned to acceptable limits, the source of the contamination remains in the area (i.e., the seals).

County Health also indicated that it was their understanding the barrier at Children's Pool Beach had been installed to keep the people away from the seals and not to keep people out of the contaminated water and that such a barrier was not required by the County Health Department. It is possible that the barrier was installed to serve both purposes. The City first placed the barrier on the beach as a temporary measure to address a public health threat. However, since that time, it has become a permanent barrier comprised of steel poles and rope. When asked if the barrier is necessary to reduce harassment of the seals, the National Marine Fisheries Service (NMFS) has indicated that it does not know whether harassment of seals has been reduced as a result of the barrier or the docent

program. In any case, the placement of the barrier on the beach was not required by the County Health Department to keep people out of the water as result of the water being contaminated.

b. Placement of Barrier at Children's Pool Beach without a Coastal Development Permit. As noted in a previous finding, the placement of a barrier at Children's Pool Beach was either to keep people out of the water or to keep people away from the seals, or both. Regardless of why the barrier was installed, it is a permanent structure on the beach and results in a change of intensity of use, in this case, a change in public access to the ocean. Furthermore, whether it is justified or not for public safety purposes, the installation of a permanent barrier on the beach requires a coastal development permit and, thus, the City's action to leave the barrier in place permanently absent a coastal development permit is a violation of the Coastal Act. The City has also indicated that they are unable to incorporate the retention of the barrier on a permanent basis into the subject coastal development permit application because it would require City Council action. As such, this matter will be pursued as a separate enforcement action.

c) More Seals Begin Using Children's Pool as a Haulout. Another significant change that has occurred at Children's Pool since establishment of the former reserve is that the harbor seals have begun to haul out on the adjacent Children Pool Beach. While they still also haul out at Seal Rock, there appears to be a larger number of seals that now haul out on Children's Pool Beach. In fact, so many seals hauled out on the beach that problems started to occur and more incidents of seal disturbance were being reported. However, no matter how many signs were installed in the vicinity warning people of the existing laws protecting seals and discouraging people from disturbing the seals, human nature is such that people tended to get as close to the seals as possible. Commission staff visited Children's Pool Beach on several occasions before a barrier was installed on the beach and observed that people would actually pet the seals and get as close as possible to the seals. Some people even walked in the middle of a group of seals for a picture.

There was much controversy at the time (i.e., beginning in March, 1999) about how the seals who had apparently "taken over" Children's Pool Beach. Members of the public, particularly divers that used this area to access the ocean, were concerned that they would be prohibited from entering Children's Pool for dives. The divers stated that there is a rip current at the end of the breakwater that they like to catch to easily get out to the ocean for scuba diving. They indicate that it is the best access point to get a "ride" out to the ocean in the entire area. This group of recreational users were most vocal, along with swimmers, back when the Commission originally reviewed the first proposal to make Seal Rock a marine mammal reserve. However, once the County posted Children's Pool as contaminated, they were no longer permitted to go into the water.

d) City's Efforts to Restore Tidal Flushing at Children's Pool and Encourage Shared-Use Between Swimmers and Seals. As a result of complaints from the public who were concerned regarding the loss of public access to Children's Pool, the City explored alternatives for a shared-use concept of Children's Pool Beach which included

review of several alternatives to improve the water quality at this location. City staff consulted experts and evaluated various options to restore the water quality to acceptable levels (safe for human contact) such that Children's Pool could be used by both seals and humans. Based on their review, City believed that the best alternative to address the problem was a proposal to dredge the sand from Children's Pool to restore it to its 1920 conditions. It was hoped that this would result in more tidal flushing of the area which would consequently result in reducing the high fecal counts and public access to the water would be restored. The City subsequently submitted a coastal development permit application (CDP #6-98-22) for this proposal. However, it was at this time that the County informed the City of their position that even if the water quality testing determined the water was safe for human contact, as long as the seals were in the area it would still consider the area to be contaminated. The City decided that its plans to attempt to lower the pollution counts at Children's Pool so that people could regain access to the ocean were pointless. Thus, the City withdrew its coastal development permit application for the dredging project.

e) Children's Pool Becomes a Rookery. Of significance is that in 1999, it was officially documented that the first seal pup was born at Children's Pool Beach; thus, making it an established rookery, as confirmed by the NMFS. The NMFS indicated they do not like to refer to this as being "designated" a rookery because this implies a reserve status and Children's Pool is not an ecological or biological reserve. As has been noted in earlier reports regarding the former marine mammal reserve, Seal Rock did not qualify for State ecological reserve status for the harbor seal because the seals are neither endangered nor threatened and do not depend on the habitat of Seal Rock for its survival. Children's Pool becoming a rookery did however change the method by which this haul-out site is managed. Before it was a rookery, if a seal pup or adult pinniped were found injured or sick on the beach or in the water, humans could intervene to rescue and care for the seals. However, once a site becomes a rookery, the NMFS manages it as a natural area where humans cannot intervene. In other words, nature is allowed to take its course the same way that it does in the wild. Human intervention is allowed only if it can be documented that the seals are injured as a result of human activity.

Today, according to the NMFS, it is not known if there are two different groups of seals-- those who use the rock for hauling out and those who use the beach for hauling out. In any case, the number of seals in both areas have increased dramatically since 1993.

It should also be noted that in the last year and a half, a volunteer docent program has been in effect at Children's Pool. The group is known as the La Jolla Friends of the Seals. According to the NMFS, the incidents of seal harassment reports have been reduced almost 100% in the last year and a half. NMFS believes this is either as a result of the installation of the barrier at Children's Pool or as a result of the presence of the docent program or both. However, they do indicate that the barrier itself was a very effective means of reducing seal harassment. The La Jolla Friends of the Seals would like the entire area to become a reserve (Seal Rock and Children's Pool) because they believe that it would afford the seals more protection and make people more aware of the laws protecting marine mammals. Although their docent program operates only on

weekends, they have indicated that they would like to expand their program to weekdays later.

C. Resource Agency Input. Upon review of all the above facts, it is clear that the two main concerns that were to be addressed through monitoring of the former temporary reserve pursuant to CDP #6-93-26 (whether the site was a rookery and what were the affects of human disturbances on seals) have not been documented. Based on the limited research and monitoring conducted during the five year period this area was a temporary marine mammal reserve, Seal Rock has not been documented to be a rookery and seal disturbances by humans have been reduced significantly. In addition, the seal population seems to be increasing in this area which would seem to indicate that the seals are not being disturbed by humans to such a degree that it is discouraging their use of the area as a haul-out location. As such, it appears that no benefit would be gained by making the area into a reserve at this time. In order to further assess this matter, Commission staff consulted with several other resource agencies including the State Lands Commission (SLC), NMFS and the California Department of Fish and Game (DFG). Written opinions from these agencies were also submitted to the City when the City was considering making the area into a reserve again (ref. Exhibit No. 5).

Essentially, two of the agencies indicated in writing that installation of signage and implementation of a docent program and education program for the public would be effective at managing the area and reducing incidents of seal harassment. DFG staff indicated that the City has no authority to create a seal reserve from granted tidelands that would generally prohibit public access across its boundaries. SLC staff expressed concerns with regard to the area being closed to public access and its conflicts with the legislative land grants. NMFS stated that they are not designating Children's Pool Beach as a refuge, reserve, or sanctuary and that this type of designation is up to the City to make, if it chose to do. To discuss these opinions further, Commission staff conducted a phone conference with all three agencies.

In discussions with these agencies, it was stated that the City's proposal to make the area into a permanent reserve would be inconsistent with the legislative land grants. There are two land grants in the subject area. One is applicable only to Children's Pool (Chapter 937) which was granted in 1931 granting tide and submerged lands to the City of San Diego (Ref. No. 6). Specifically, the grant states, in part:

- (a) That said lands shall be devoted exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes;
- (b) The absolute right to fish in the waters of the Pacific ocean over said tidelands or submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby reserved to the people of the State of California.

Although Children's Pool is not the subject of this coastal development permit application, it should be noted that SLC staff has indicated that because the existing statute specifically talks about public access and recreational use of the area, a permanent barrier on the beach which blocks access to the ocean is inappropriate. This particular land grant is more specific than the broader state land grants because it specifically calls for the area being devoted to a bathing pool for children. This is the only grant to the City that has these specific requirements in it. The City should be doing everything possible to protect public access in this area and to alleviate the health concerns. However, if the City believes that protecting the seals is a higher public need than public access to the waters, then they should seek a change to the law. SLC staff has also indicated that if the barrier is only temporary, however, and is needed for health and water quality reasons, such a barrier is not inconsistent with the grant language. Furthermore, all agencies agree that if the water is contaminated, that access to the water should not be allowed to assure public health and safety. As noted previously, the issues associated with Children's Pool and the barrier will be dealt with separately.

With regard to the proposed Seal Rock Marine Mammal Reserve, SLC staff and DFG staff both expressed their reservations about the area being made into a permanent reserve. SLC staff refer to a separate grant, Chapter 688, a Legislative Grant dated 6/5/33 which essentially turned over a three mile area of submerged lands under the ocean to the City. The language of that grant cites a much broader use that the lands can be used for. This statute is clearly applicable to Seal Rock and the proposed boundaries of the reserve (ref. Exhibit No. 7). The grant provides that the tidelands shall be used for the establishment, improvement and conduct of harbors and construction of bulkheads or breakwaters for the protection of lands within its boundaries, and the like. In addition, the last subsection of the grant specifically states:

"...(d) There is hereby reserved, however, in the people of the State of California the absolute right to the public use of said tidelands and to fish in the waters thereof, with the right of access to said waters over said tidelands for said purpose."
[Emphasis added]

Therefore, the City's action to exclude public access to the water on a permanent basis is inconsistent with the above land grant. SLC staff further stated that making the reserve "temporary" for purposes of conducting a study, etc., could be found consistent with the land grant but that a permanent reserve would clearly be inconsistent and could not be permitted unless the City sought and received approval of an amendment to the grant to specifically prohibit the public from access to the open coastal waters. DFG staff also stated that they had sent a letter to the City indicating that they did not believe the City had the legal authority under their tidelands grant to exercise resource management of this area.

With regard to whether or not making the area a reserve would afford the seals more protection, NMFS staff stated that if the seals could not use Seal Rock, it would not significantly harm the seals at this location. However, this would not be the case if they were pupping on the rock. In addition, the existing Marine Mammal Protection Act

(MMPA) is applicable to the seals at Children's Pool Beach and Seal Rock regardless whether these areas are afforded reserve status or not. As noted previously, essentially the MMPA states that if anyone changes the behavior of the seals, it is a violation of the Act. When people disturb the seals it also disrupts their resting period. The only difference a reserve status would make is that it would allow the City to enforce keeping people away from the rock and may result in less likelihood of seal disturbances by humans.

The NMFS staff indicated that from a biological perspective, if the area is ever made into a permanent reserve, it would make sense to incorporate both Children's Pool and Seal Rock because the entire area is their habitat area. However, from an enforcement perspective, if the area were not made into a reserve, it could become a potential enforcement problem because NMFS could become inundated with phone calls and reports of seal disturbances. There is only one NMFS enforcement officer in San Diego County to respond to reports of seal harassment. Although the agency receives reports of harassment occasionally, it is rare that there is a need to actually cite someone as a result of violation of the MMPA. The enforcement officer usually responds to such reports and gives verbal warnings to people who are disturbing the seals, which up to this time appears to be sufficient to deter the offenders. No citations have been issued to date. The City noted one incident where the enforcement officer had to respond to a report of a group of inebriated youths on Children's Pool Beach at night who were making noise. However, as has been noted, the incidents of seal harassment are almost non-existent at this time, largely due to the barrier and/or the docent program. NMFS staff also indicated that whether or not they would receive a lot of reports of seal disturbances by humans largely depends on how well the public adheres to the existing signage in the area. If they stay away from the seals, not making it into a reserve might not be a problem. However, if they do not adhere to the signs and begin to try to get as close to the seals as they can, this could pose a serious problem.

According to the City Department of Parks and Recreation, the City lifeguards have indicated that since the reserve status has lapsed, there has been use of the area by swimmers and divers off of Shell Beach and the water area around Seal Rock, as well as the tidepool area east of Seal Rock. City Parks and Recreation Department staff state that the lifeguards still ask people not to climb on the rock as so doing could violate the MMPA. Federal law preempts state law which means that the Marine Mammal Protection Act preempts state and local laws regarding protection of seals or establishment of reserves, etc. The lifeguards and NMFS enforce the MMPA at Children's Pool and the former reserve area. In addition, when the reserve was in effect, the lifeguards at Children's Pool also had the ability to cite people for violation of the City's ordinance to enter the boundaries of the reserve area because it prohibits public access to the water. They would maintain this authority if the reserve were to be re-instituted. However, according to City staff, the lifeguards' primary responsibility is to ensure the public safety of those swimming in the ocean and they only intervene in seal disturbances if a potential violator is trying to harm a seal.

It should be noted, however, that since the reserve has lapsed, there does not appear to have been any increase in seal disturbance. In fact, by all accounts, seal harassment is almost non-existent. However, some people believe it is because people still think that the area is a reserve and therefore do not enter the water or disturb the seals. This may be partially true, but the public does enter the waters surrounding the rock, especially at low tide conditions and as documented by the lifeguard service noted above. Commission staff observed at least 30 people tidepooling in the area of the submerged rocks between Seal Rock and the toe of the coastal bluffs on the Sunday of the Thanksgiving holiday weekend of 2000. At this time, there were no seals on Seal Rock itself. Instead, all of the seals were hauled out on Children's Pool Beach. Almost no one walked down onto the beach at Children's Pool. Everyone was observing the seals from either the breakwater or from the public walkways above that overlook Children's Pool Beach and Seal Rock. At such tide conditions, the presence of people in this area does not appear to be detrimental to the seals or interfere with their resting habits. As noted previously, another potential reason harassment has decreased is due to the installation of the barrier at Children's Pool and the presence of docents in the area.

D. Modifications to Reserve. The proposed project raises conflicts between the two competing uses of public access and protection of the seals. In this particular case, the Commission must weigh the protection of each resource, that on balance, is the most protective of coastal resources. As stated previously, based upon the Hubbs-Sea World Report, the City thoroughly addressed other alternatives to making Seal Rock a permanent marine mammal reserve. In addition, it has been acknowledged that the former temporary reserve had not achieved its desired purpose of reducing disturbances of seals by people. Other alternatives such as implementation of a docent program, installation of interpretive signage and separation of people from the seals at Children's Pool Beach were considered to be most effective at reducing seal disturbances in the area. Therefore, to make the area into a permanent reserve which would preclude the public from having access to this area entirely cannot be found consistent with the Chapter 3 policies of the Coastal Act addressing public access and recreation.

Additionally, the project raises concerns with regard to consistency with the legislative land grants cited previously. Upon review of all this information, it appears that making the area into a permanent reserve is inconsistent with the above-cited state tideland grants. As stated in the previous findings, both SLC staff and DFG staff believe that a permanent reserve status for any of the granted tidelands at this location is inconsistent with the grant language. Further, the Commission finds that given the information that is available today, making the area into a permanent reserve is not supportable. If the City conducts additional studies or obtains additional information that would support a change in the land grants, the City always has the option of going before the legislature to seek an amendment to the land grant.

In the interim, however, the Commission finds that there may be some benefit in permitting another temporary reserve for five years which will allow the City time to re-evaluate the effectiveness of the reserve and to decide it wants to eventually make the area into a permanent reserve. Furthermore, making the area into another temporary

reserve for five years will protect Seal Rock itself such that people will not be allowed to climb onto it or approach it too closely, thus disturbing the seals. Without a temporary reserve, the public could potentially disturb the seals. Because the City is proposing the reserve as a permanent reserve, Special Condition #1 specifies the time limits such that the proposed marine mammal reserve shall be temporary only for a period of five years.

However, as noted above, evidence indicates that there is less disturbance presently occurring to the seals as a result of the barrier at Children's Pool and also the presence of a docent program, etc. As such, it appears that the boundaries of the proposed reserve are larger than necessary and result in impacts to public access opportunities in the area. Therefore, the Commission finds that in order to find the proposal consistent with Coastal Act policies, the boundaries of the reserve must be reduced. NMFS staff has indicated that a buffer of 50-100 feet is adequate to keep people away to avoid disturbance to the seals on the rock. This will result in a smaller reserve area to the south and east of the rock and allow for some limited use of the area for recreation such as allowing scuba divers into the area, swimmers or tidepoolers.

A reduction in the size of the marine mammal reserve will still afford protection of the marine mammals, particularly around Seal Rock itself, and will achieve a balance between protection of public access and protection of marine resources, namely, the harbor seals at this location. Furthermore, restricting public access to this area on a temporary basis will also render the project consistent with the above-cited legislative land grants. In any case, commercial fishing will still be permitted within the boundaries of the reserve because it is expressly provided for as a permitted use pursuant to the above-cited land grants.

Special Condition #3 requires the City to submit a final site plan documenting revisions to the boundaries of the permitted reserve such that the size of the reserve is reduced to no more than 100 ft. south and east of Seal Rock, with the boundaries to the north and west remaining unchanged. Special Condition #2 requires the City to submit a sign plan for any proposed installation of signs in the area identifying the boundaries of the reserve and for education and information purposes regarding the harbor seals. No more than eight signs total shall be permitted and shall consist only of monument or wall signs. No freestanding, pole or roof signs shall be permitted on the sandy beach area of Children's Pool Beach.

The Coastal Act also calls for the protection of marine resources and that special protection shall be given to areas and species of special biological significance. The Act further provides that uses of the marine environment shall be done in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes. In this particular case, evidence does not support the need to make Seal Rock a permanent marine mammal reserve to protect seals in this area. As noted previously, the harbor seals are thriving at this location (Children's Pool Beach as well as Seal Rock). In addition, they are neither an endangered or threatened species which would afford special protection pursuant to the

Coastal Act. However, the Commission finds that permitting another temporary reserve for five years (although reduced in size) will afford some benefit to the seals at this haul-out site by helping to reduce the potential for disturbance by humans. Such a reserve will also allow the City and/or others to study the effectiveness of the reserve for scientific or educational purposes, consistent with the Coastal Act. As noted above, a reduction in the size of the reserve boundaries; however, will also open up an area south and east of the reserve that may be used by divers, swimmers, tidepoolers, etc. Thus, protection of both public access and marine resources can be achieved in this area.

In summary, although seals are currently using Seal Rock to haul out, they are also using the adjacent Children's Pool Beach to the south. To date, Seal Rock has not been documented as a rookery or as an area necessary to support the seal population in this area. Nonetheless, the City is proposing to make the rock and surrounding area a permanent marine mammal reserve. This is inconsistent with the public access and recreation policies of the Coastal Act. In addition, delineation of Seal Rock as a permanent marine mammal reserve is inconsistent with the state tidelands grant. Thus, a permanent reserve is not an option. However, approval of a temporary reserve is consistent with the grant and allows time for further study to determine the impacts of Seal Rock to the local harbor seal population; however, only if the reserve area is reduced to minimize impacts on public access. Special conditions proposed will limit the reserve to a temporary five year term and reduce the reserve area. Therefore, the Commission finds the proposal consistent with all applicable sections of the Coastal Act.

3. No Waiver of Violation. The proposed development involves the establishment of a temporary marine mammal reserve. The City has installed a permanent barrier to the south of the reserve boundaries on Children's Pool Beach absent a coastal development permit. Although development has taken place prior to the submission of this permit request, consideration of the request by the Commission has been based solely upon Chapter 3 policies of the Coastal Act. Commission action upon the permit does not constitute a waiver of any legal action with regard to the alleged violation of the Coastal Act that may have occurred; nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit.

4. Local Coastal Planning. Section 30604(a) also requires that a coastal development permit shall be issued only if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act. In this case, as conditioned, such a finding can be made.

The subject site is located in an area of original jurisdiction, where the Commission retains permanent permit authority. The subject permit, as conditioned, would create a temporary marine mammal reserve in open coastal waters. The project, as conditioned, is consistent with the certified LCP and all applicable Chapter 3 policies of the Coastal Act. Therefore, the Commission finds that approval of the proposed development will not prejudice the ability of the City of San Diego to continue to implement its certified LCP for the La Jolla community.

5. Consistency with the California Environmental Quality Act (CEQA).

Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project has been conditioned in order to be found consistent with the public access policies of the Coastal Act. Mitigation measures, including conditions addressing permit time limitations, signage and boundaries of the proposed marine mammal reserve, will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgment. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.